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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

TOD MIKURIYA, Plaintiff and Appellant, v. MEDICAL BOARD OF CALIFORNIA et al., Defendants and Respondents.	A104252 (San Francisco County Super. Ct. No. 321539)

Tod Mikuriya (plaintiff) appeals from a judgment dismissing his first amended complaint for damages and injunctive relief against the Medical Board of California (Board) and five individuals associated with the Board (individual defendants), which was entered following an order sustaining defendants' demurrer without leave to amend. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff is a psychiatrist, licensed by the Board to practice medicine in California, who has written and lectured actively on the medical uses of marijuana. On July 14, 2000, the Board filed an accusation based on allegations concerning his prescription of marijuana to patients. On May 22, 2001, he filed a complaint against the Board and the five individual defendants, which does not appear to have been served. Two years later, he filed an amended complaint, alleging 15 causes of action for damages and injunctive relief arising from the defendants' prosecution of the accusation against him.

Defendants responded to the amended complaint by filing a demurrer to the complaint on the ground that it was barred by the doctrine of exhaustion of administrative

remedies, the immunity conferred by Government Code section 821.6, and the doctrine of res judicata. In an order filed July 17, 2003, the trial court granted the demurrer without leave to amend and entered a judgment of dismissal on August 4, 2003. Plaintiff filed a notice of appeal from the judgment.

Shortly thereafter, a hearing was held before an administrative law judge on an amended accusation against plaintiff alleging unprofessional conduct, negligence and incompetence in the prescription of marijuana for medical purposes. A proposed decision recommended revocation of plaintiff's license but that the revocation of plaintiff's license be stayed and plaintiff be placed on probation for five years. The Board adopted the decision in an order entered March 18, 2004.[1]

Following publication of the proposed decision, defendants filed a motion to dismiss the appeal on the ground that the decision in the administrative hearing rendered moot the relief sought in the complaint. We deferred ruling on the issue of mootness pending review of the merits of the appeal.

DISCUSSION

A. Standard of review

" ' "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" [Citation.]' [Citation.] 'The task of the reviewing court, therefore, "is to determine whether the pleaded facts state a cause of action on any available legal theory." [Citation.] Where, as

[1] We grant the Board's Requests for Judicial Notice filed on March 10, 2004 and May 18, 2004.

here, a demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility the defect can be cured by amendment; if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.' [Citations.] The burden is on appellant ' "to demonstrate that the trial court abused its discretion and to show in what manner the pleadings can be amended and how such amendments will change the legal effect of their pleadings. [Citations.]" [Citation.]' [Citation.]" (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 121-122.)

Although the standard of review on appeal is clear, our review is made difficult by lack of clarity in the amended complaint which the Board aptly describes as "a rambling, often incoherent stream of allegations."

B. Exhaustion of Administrative Remedies

The order sustaining the demurrer was premised in large part on the doctrine of exhaustion of administrative remedies. "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) "It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts." (*Id.* at p. 293; see also *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1125; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73; *Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 981.) "Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review." (*Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240.)

We find that the doctrine of exhaustion of remedies applies to the injunctive and declaratory relief sought in 11 of the 15 causes of action of the amended complaint: the third cause of action alleging intimidation and threats of violence in violation of Civil Code section 51.7; the fourth cause of action alleging retaliatory discrimination; the sixth cause of action alleging a course of conduct designed to retaliate against plaintiff's exercise of his right to petition; the seventh cause of action alleging discrimination in violation of the Unruh Civil Rights Act; the eighth cause of action alleging interference with exercise of civil rights in violation of Civil Code section 52.1; the ninth cause of action alleging violation of plaintiff's right to free speech; the tenth cause of action alleging violation of right to privacy; the eleventh cause of action alleging investigatory actions in violation of due process; the twelfth cause of action alleging violation of Health and Safety Code section 11362.5; the thirteenth cause of action alleging unprofessional conduct in violation of Health and Safety Code section 11362.5 and Business and Professions Code section 2238; and the fifteenth cause of action alleging enforcement of an improperly promulgated standard in violation of Government Code section 11340.5. The doctrine of exhaustion of remedies constitutes a dispositive basis for sustaining the demurrer to six of these causes of action that seek only injunctive or declaratory relief, i.e., the sixth, ninth, eleventh, twelfth, thirteenth, and fifteenth causes of action.

In this appeal, plaintiff offers arguments in support of several causes of action that serve only to illustrate the application of the exhaustion of remedies doctrine. With respect to the eleventh, twelfth, and thirteenth causes of action, he argues that Health and Safety Code section 11362.5, subdivision (c), provides a broad and unqualified immunity for recommending marijuana to a patient for medical purposes. As alleged in the ninth cause of action, he maintains that the administrative proceeding instituted by the Board violates his first amendment rights and those of his patients. And in support of the fifteenth cause of action, he contends that the Board engaged in unauthorized rulemaking in violation of Government Code section 11340.5 in the administrative proceeding against him. Since each of these contentions can be raised in the administrative

proceeding itself, it is sufficient to hold that they are barred by the doctrine of exhaustion of administrative remedies. We have no need to analyze the actual merits of the contentions.

We see no merit to plaintiff's contention that he could not raise the issue of the patient's right to privacy in the administrative proceeding. The record discloses that the administrative law judge in fact ruled on this issue in response to plaintiff's motion to dismiss the accusation. Again, plaintiff cannot avail himself of the argument that the courts can provide more effective redress than he is likely to receive in the administrative proceeding. " 'Under the doctrine of the exhaustion of administrative remedies, a party must go through *the entire proceeding* to a "*final* decision on the merits of the entire controversy" before resorting to the courts for relief.' [Citation.]" (*Bollengier v. Doctors Medical Center, supra,* 222 Cal.App.3d 1115, 1125.)

C. Mootness

The conclusion of the administrative proceeding renders moot plaintiff's causes of action to enjoin the proceeding. *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1 provides an illustration of this principle. Plaintiff brought an action to prevent a special election on a housing moratorium. The trial court denied a preliminary injunction, relying on an earlier settlement agreement, and the election was held during the pendency of the appeal. The court held that the merits of the preliminary injunction had become moot since the special election did take place. "[A]n action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events." (*Id.* at p. 10.)

Plaintiff argues that the order suspending his medical license does not constitute a final judgment adjudicating such issues as violation of the right to privacy, discrimination, and unprofessional conduct, which he seeks to raise in the present action. The propriety of enjoining the administrative proceeding, however, is no longer justiciable since the Board has already concluded the proceeding by an order suspending plaintiff's license. The issues that he seeks to raise in the present action now must be raised in an administrative mandate proceeding to set aside the suspension order.

We conclude that the doctrine of mootness provides an independent ground for rejecting plaintiff's appeal from the order sustaining the demurrer to the 11 causes of action for injunctive and declaratory relief reviewed above.

D. Immunity

The demurrer to the causes of action for damages was based on the immunity of Government Code section 821.6, which provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." The immunity afforded to individual defendants under this section also shields the Board since Government Code section 815.2, subdivision (b), provides that "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (See also *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491, 496.)

"The immunity conferred by section 821.6 is not limited to peace officers and prosecutors but has been extended to public school officials [citation], heads of administrative departments [citation], social workers [citation], county coroners [citation], and members of county boards of supervisors [citation]." (*Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 901.) The immunity "extends to actions taken in preparation for formal proceedings" (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210) and "encompasses conduct during an ongoing prosecution . . . ." (*Randle v. City and County of San Francisco* (1986) 186 Cal.App.3d 449, 456.)

We find that the immunity of section 821.6 clearly applies to claims for damages in the first cause of action for negligent supervision and training; the second cause of action for improper investigation; the third cause of action for intimidation and threats of violence in violation of Civil Code section 51.7; the fourth cause of action for retaliatory discrimination; the seventh cause of action for discrimination in violation of the Unruh Civil Rights Act; the eighth cause of action for interference with exercise of civil rights in violation of Civil Code section 52.1; the tenth cause of action for violation of right to privacy; and the fourteenth cause of action for malicious prosecution. The immunity

constitutes a dispositive basis for sustaining the demurrer to three of these causes of action that seek only damages, i.e., the first, second and fourteenth causes of action.

E. Taxpayer Suit

The fifth cause of action seeks injunctive and declaratory relief pursuant to Code of Civil Procedure section 526a to prevent the defendants from "wasting the taxpayers' money in this fashion." It continues: "Only cases founded on probable cause to arrest should result in arrest. Only facts that indicate an overwhelming likelihood of guilt should result in prosecutions or other sanctions." The defendants demurred to this cause of action on the ground that it "failed to allege any legal or factual basis for a taxpayer suit."

Code of Civil Procedure section 526a provides in relevant part: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein."

"The primary purpose of this statute, originally enacted in 1909, is to 'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.' [Citation.] [¶] California courts have consistently construed section 526a liberally to achieve this remedial purpose. Upholding the issuance of an injunction, we have declared that it 'is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving[s] of tax funds.' [Citation.]" (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268.)

"A taxpayer suit is authorized only if the governing body has a duty to act and has refused to do so. If the governing body has discretion and decided not to act, then the court is prohibited from substituting its discretion for the discretion of the governing body." (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264,

1281.) Thus, in *TRIM, Inc. v. County of Monterey* (1978) 86 Cal.App.3d 539, the plaintiffs alleged that unequal tax assessment practices resulted "in wasteful expenditure of county funds." (*Id*. at p. 543.) Affirming an order sustaining a demurrer to the complaint, the court observed, "[T]he term 'waste' as used in section 526a means more than an alleged mistake by public officials in matters involving the exercise of judgment or discretion." (*Ibid*.) Accordingly, it held: "appellant makes no objection to any program or project, but merely generally alleges that the county is wasting money because it is not collecting all that it could in revenues. We conclude that these allegations are insufficient to state a cause of action for relief under Code of Civil Procedure section 526a." (*Ibid*.)

In the case at bar, plaintiff alleges a mistaken decision of the Board to institute proceedings to suspend or revoke his license to practice medicine and a series of abusive actions in prosecution of this administrative proceeding. These allegations plainly concern the exercise of discretion by the Board, its members and executive director. The fifth cause of action alleges waste in conclusory terms and then proposes standards that should guide the defendants' decisions, i.e., "probable cause" and "overwhelming likelihood of guilt." The introductory provisions of the complaint allege a series of grievances relating to the decision to institute the administrative proceedings and the conduct of the investigation and enforcement proceedings. We find nothing in the amended complaint that might be construed to address a nondiscretionary duty imposed by law, and we see no reasonable likelihood that the complaint can be amended to allege breach of such a duty.

F. Leave to Amend

In a supplemental memorandum in opposition to demurrer, plaintiff argued that he should be allowed to amend three causes of action to state a cause of action under title 42 United States Code section 1983 (section 1983), i.e., the sixth cause of action for interference with the right to petition guaranteed by the First Amendment of the United States Constitution; the eleventh cause of action alleging seizure of records in violation of due process guaranteed by the Fifth and Fourteenth Amendments; and the twelfth cause

of action alleging violation of the right to free speech guaranteed by the First Amendment.

As explained in *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348, "[s]ection 1983, a long-dormant Reconstruction-era civil rights statute, gained modern vitality in *Monroe* v. *Pape* (1961) 365 U.S. 167, overruled in part by *Monell* v. *New York City Dept. of Social Services* (1978) 436 U.S. 658, 663. [Citation.] Its primary purposes are compensation and deterrence 'for violations of federal rights committed by persons acting under color of state law.' [Citations.] Section 1983 claims may be brought in either state or federal court." (Fn. omitted.)

The exhaustion of state administrative remedies is not a prerequisite to bringing a suit pursuant to section 1983. (*Patsy v. Florida Board of Regents* (1982) 457 U.S. 496, 516.) But states and state officials acting in their official capacities may not be sued for damages under the statute, though suits for prospective injunctive relief may be allowed. (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 71, fn. 10; *Howlett v. Rose* (1990) 496 U.S. 356, 365.) In general, action under color of state law is essential to a claim under section 1983. (*Monroe v. Pape, supra,* 365 U.S. 167, 172.) The plaintiff must show a causal connection between deprivation of federal rights and official conduct taken or directed under the authority of state law. (*Board of Comm'rs of Bryan Cty. v. Brown* (1997) 520 U.S. 397, 404-405.)

"Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment." (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) " 'However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion.' [Citations.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "To meet the plaintiff's burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

On the present record, we conclude that plaintiff failed to show how the complaint could be amended to allege a valid claim for relief under section 1983. We do not find

the essential elements of such a claim in the bare identification of constitutional rights in the sixth, eleventh and twelfth causes of action or in the narrative of events alleged in the introductory portions of the complaint. More importantly, plaintiff did not present an explanation of how he would allege the causal connection between a deprivation of constitutional rights and deliberate action taken under color of state law. It is not enough to identify a series of federal constitutional rights or to allege violations of state law; a plaintiff must allege deliberate actions taken under color of state law that violate federal constitutional rights.

We note that the amended complaint was filed approximately two years after the original complaint. Neither complaint alleged a federal cause of action under section 1983. The issue was first raised in a very brief supplementary memorandum in opposition to demurrer, which lacks any outline of proposed allegations of a cause of action under the statute. We think the trial court acted well within its discretion in concluding from this delayed and inadequate presentation of plaintiff's legal theory that there was no reasonable possibility that the complaint could be amended to state a cause of action under section 1983.

The judgment is affirmed.[2]

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Swager, J.

We concur:

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Stein, Acting P. J.

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Margulies, J.

[2] In view of our opinion, we need not rule on the Board's motion to dismiss.